TOHONO O'ODHAM NATION
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-92-A, 91-134-A Decided August 14, 1992

Appeals from decisions concerning certain lands acquired by the Tohono O'odham Nation under the Gila Bend Indian Reservation Lands Replacement Act of 1986.

Affirmed.

1. Indians: Taxation--Indians: Water and Power Resources: Irrigation Projects--State Taxes

   The distinction between a real property tax and a special assessment is that a tax is levied against all similarly situated property for purposes which will benefit the public generally and a special assessment is levied only against the specific property which benefits from the improvement financed by the assessment.

2. Indians: Taxation--Indians: Water and Power Resources: Irrigation Projects--Statutory Construction: Indians

   In determining whether charges imposed by an irrigation district are real property taxes for purposes of a particular Federal statute, the critical inquiry is whether such charges have the characteristics Congress had in mind in employing the term "real property taxes" in the statute.

3. Indians: Lands: Trust Acquisitions--Statutory Construction: Indians

   When Congress enacts legislation providing for the trust acquisition of land for an Indian tribe, it should be deemed to intend that the normal title standards for trust acquisitions will apply unless it provides otherwise in the statute.

APPEARANCES: David P. Frank, Esq., Mark E. Curry, Esq., and M. Kathryn Hoover, Esq., Sells, Arizona, for appellant; Kathleen A. Miller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Tohono O'odham Nation (Nation) seeks review of April 15, 1991, and July 19, 1991, decisions of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning certain lands acquired by appellant under the Gila Bend Indian Reservation Lands Replacement Act of 1986 (the Act), P.L. 99-503, 100 Stat. 1798. For the reasons discussed below, the Board affirms the Area Director's decisions.

Background

The background of the matter at issue here is succinctly set out in the April 15, 1991, Phoenix Field Solicitor's opinion on which the April 15, 1991, Area Director's decision is based. At pages 1-3, the Field Solicitor's opinion states:

> The Gila Bend Indian Reservation [one of the Nation's three reservations] was established by the Executive Orders of December 12, 1882 and June 17, 1909. The reservation contains 10,297 acres and is divided by the Gila River. The reservation lies within the San Lucy District, a political subdivision of the Tohono O'odham Nation (formerly the Papago Tribe). * * * In 1960 the Corps of Engineers completed construction of Painted Rock Dam on the Gila River ten miles downstream from the reservation. A 1963 study by the U.S. Geological Survey concluded that, although nearly all of the reservation would be flooded when the reservoir was full, the long-range effects of inundation by high water likely would be unimportant because maximum floods would occur only rarely. In 1964, the United States obtained through condemnation a flowage easement for 7723.82 acres of the reservation (75 per cent of the total acreage), which gave the United States the perpetual right to flood the land and prohibited use of the land for human habitation. The tribe received $130,000 in compensation. Pursuant to the Act of August 20, 1964, Pub. L. 88-462, 78 Stat. 559, the Indians living within the reservoir flood plain were relocated to a 40-acre tract of land south of the reservation known as San Lucy Village.
>
> Major flooding of the reservation occurred in 1978-79, 1981, 1983 and 1984, each time resulting in a large standing body of water. The flooding, which was far greater than expected, destroyed a 750-acre tribal farm and precluded any economic use of reservation lands. In 1981, the Tribe petitioned the United States for a new reservation suitable for agricultural development. In 1982, Congress authorized and directed the Secretary of the Interior to exchange lands in the public domain for the reservation lands determined to be unsuitable for agriculture. Southern Arizona Water Rights Settlement Act (SAWRSA), Pub. L. 97-293, 97 Stat. 1274. A subsequent study determined that all of the arable land on the reservation had been made unsuitable for agriculture or for grazing livestock. The

Secretary then contracted with the Tribe for a study to identify federal lands within a 100-mile radius of the reservation suitable for agriculture and for exchange. None of the sites were found to be suitable in terms of land and water resources. The initial results of the federal study indicated that the costs of land and water acquisition, construction of a water delivery system and operation and maintenance would exceed $30,000,000. H.R. Rep. No. 851, [99th Cong., 2d Sess.] 6-7 [(1986).]

In order to compensate the Tribe, Congress enacted the [Act]. In Section 2 of the Act, Congress found that SAWRSA had authorized the Secretary to exchange the reservation lands for public lands suitable for farming; that public lands within a 100-mile radius of the reservation suitable for farming would require substantial federal outlays for construction of irrigation systems, roads, education and health facilities; and that the lack of an appropriate land base severely retarded the economic self-sufficiency of the O'odham people, contributed to their high unemployment and acute health problems and resulted in chronic high costs for federal services and transfer payments. Section 2(4) provides:

> This Act will facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming and do not require Federal outlays for construction, and promote the economic self-sufficiency of the O'odham Indian people.

Section 4 of the Act provides that, if the Tribe assigned to the United States all right, title and interest in 9880 acres of land within the Gila Bend Indian Reservation, the Secretary would pay the Tribe $30,000,000, payable in three annual installments of $10,000,000, together with interest. * * * Section 6(c) authorizes the Tribe to purchase private lands not to exceed 9880 acres in the aggregate. Section 6(d) [requires the Secretary to hold the land in trust if it meets certain requirements].

Section 7 of the Act provides that "with respect to any private land acquired by the tribe under section 6 and held in trust by the Secretary, the Secretary shall make payments to the State of Arizona and its political subdivisions in lieu of real property taxes."

By agreement dated October 15, 1987, the Tohono O'odham Nation assigned all its rights, title and interest to the 9880 acres and waived and released any claims of water rights or injuries to land or water rights with respect to the Gila Bend Indian Reservation, to take effect upon payment of the $30,000,000 to the Nation.

Pursuant to the Act, the Nation began the search for replacement lands and, in 1987, began negotiations for the purchase of the Schramm Ranch in

Pinal County, Arizona, consisting of approximately 3,120 acres and including approximately 2,910 acres of irrigation grandfathered rights in the Pinal Active Management Area. The ranch was included in the Central Arizona Irrigation and Drainage District (District). In 1984, its owners, Donald E. Schramm and Nada Lu Schramm, had signed a Memorandum of Understanding and Agreement (Water Agreement) with the District. The Water Agreement provided, inter alia:

> 4. Agricultural Water Service Contract
>
> * * * District shall tender to, and landowner shall sign, a Contract. It is agreed that the principal provisions of said contract will include the following:
>
> (a) That Landowner will pay to District the Water Availability Charge (which will be computed on an acreage basis and must be paid each year regardless of the amounts of water received by landowner) and the Water Use Charge (based upon the amounts of water in acre-feet delivered each year to Landowner), both of which charges will be determined by District and will be based upon the same per unit or per acre charge for all landowners, irrespective of location of their lands within the District. The Water Availability Charge will include such amounts necessary to pay the fixed annual costs of the District, including fixed annual costs of [Central Arizona Project] water as established pursuant to the Water Service Subcontract, operation, maintenance, and replacement of distribution system facilities, repayment of the [construction contract with the United States], and repayment of the general obligation bonds of the District. The Water Use Charge will be based on all variable costs, including energy for pumping water.
>
> * * * * * *
>
> (d) The right to receive Project water furnished under said Contract will form a part of the appurtenances to the Lands; such water is a direct benefit to the Lands and the covenants of Landowner to pay for said water and other obligations of landowner under the Contract shall run with and bind said Land.
>
> * * * * * *
>
> 6. Creation of Lien.
>
> Pursuant to the provisions of A.R.S. § 45-1588, Landowner by executing this Agreement expressly creates a first and prior lien upon the Lands in favor of District to secure the obligations of Landowner created hereunder and to be continued under the Contract and to secure the payment of all lawful charges of the District, which lien shall remain upon said Lands despite any transfer, hypothecation or alienation thereof by Landowner.

* * * * * *

9. District Taxes.

Landowner acknowledges that his Lands will be subject to taxes levied by the District for the purpose of obtaining necessary funds to pay the cost of debt service on District bonds and to pay other District expenses incurred. After initiation of water delivery, all or a portion of the fixed annual costs of the District may be obtained through the, levy of taxes.

* * * * * *

11. Agreement to Inure to Successors.

This Agreement shall bind and inure to the benefit of the parties hereto, their personal representatives, heirs, successors and assigns and any subsequent owner of the Lands. Landowner agrees to notify District of any sale, partition or assignment of the Lands.

On February 2, 1988, the Nation entered into a sale agreement for the Schramm Ranch, in which it agreed to purchase the ranch for $6,500,000. The agreement also provided, inter alia:

Buyer acknowledges that Buyer has received and reviewed a copy of the [Water Agreement] whereby the District obtains certain rights, including the right to acquire Seller's grandfathered water rights and wells upon certain terms and conditions, and further acknowledges that the Water Agreement expressly provides that the Water Agreement shall be binding on any subsequent owner of the land. Buyer further agrees to acquire the sale property subject to the Water Agreement and the Water Agreement may be reflected as an exception in the title insurance policy issued to Buyer. [Section 6 (a), p. 4.]

* * * * * *

Buyer further acknowledges that the sale property is part of the [District] and that the District has a lien on the sale property for various existing obligations (including the obligations to repay bonds issued by the District to finance a distribution system) and that additional liens may arise for future taxes or other District obligations. [Section 8(c), p. 7.]

* * * * * *

Buyer plans to acquire the sale property as an Indian reservation, or portion thereof, with title thereto being held by the United States of America, in trust. Buyer recognizes that the inclusion of the sale property as part of an Indian reservation constitutes a potentially significant modification of the

> relationship which exists between Seller and the sale property, on the one hand, and the [District] and/or the other landowners in the District, on the other. Seller's cooperation in the creation of the sale property as an Indian reservation is predicated on Buyer's assurance that Buyer's actions will not be detrimental to the District or the other landowners therein. In this respect, Buyer has assured Seller that it is Buyer's intention that the status quo will be maintained as nearly as possible so far as the relationship between the sale property and its owners and the District, the other landowners in the District and the District's bondholders are concerned consistent with the sale property becoming an Indian reservation, and that Buyer will undertake to alleviate any hardships which might be caused thereby. [Section 15(f), pp. 11-12.]

On February 3, 1989, the Nation's attorney submitted title documents to BIA, including two warranty deeds, one covering seven parcels and the other one parcel. Both deeds contained the following exceptions:

> Any charge upon said land by reason of its inclusion in Electrical District Number Four; Central Arizona Water Conservation District; Pinal County Flood Control District; and [the District].
>
> * * * * * *
>
> Memorandum of Understanding and Agreement by and between [the District] and DONALD E. and NADA LU SCHRAMM, dated March 26, 1984, recorded June 27, 1984 in Docket 1232, Page 286.

The title insurance policy submitted by the Nation's attorney also contained these same exceptions, among others.

Upon purchasing the Schramm Ranch, the Nation renamed it the "San Lucy Farm" (Farm).

The record does not show any further contacts between the Nation and BIA until March 1991. As of that time, BIA had not formally taken the Farm lands into trust.

In 1988 and 1989, the Nation paid “in-lieu taxes” to the District, covering, evidently, the charges described in the Water Agreement as the “Water Availability Charge,” i.e., repayment of construction costs; repayment of bonds; and operation, maintenance, and replacement costs. These charges totalled $27,057.72 in 1988 and $28,343.40 in 1989. By letter of October 29, 1990, the District informed the Nation that the levy for 1990 was $75.10 per acre and that, “[s]ince the Pinal County assessors office is unable to assess the Tohono O'odham property, the District's in lieu of taxes on 2,910 acres totals $218,541.00.”

On March 4, 1991, the District executed an "Agreement for Project Water Service" to the Nation. 1/ Section 2 of the agreement provides:

PAYMENTS FOR WATER SERVICE

> (a) Landowner agrees to pay before delinquency the taxes and assessments levied and assessed for the District on a per acre basis by Pinal County, against the Lands pursuant to the provisions of Title 48, Chapter 19, of the Arizona Revised Statutes or as the same may be hereafter amended;
>
> (b) Landowner further agrees to pay to District the water charges on a per acre-foot basis, or ensure the water charges are paid if to be paid by Landowner's representative, in accordance with procedures therefor set forth in District's Rules and Regulations.
>
> (c) Project Water Service to the Lands may be withheld pending payment of the amounts due under subparagraphs (a) and (b) above.

On March 21, 1991, the Nation apparently paid the 1990 assessment under protest. 2/ On the same day, the Nation's attorney wrote to both the District and the Area Director asserting that the lands were in trust status by operation of law, despite the lack of any formal action by BIA. He further asserted that the Nation was not liable for the in-lieu tax payments, which were, rather, the responsibility of the United States under section 7(a) of the Act.

The District's attorney responded by letter of March 29, 1991, stating in part:

> You are correct in your determination that the District is a political subdivision of the State of Arizona and perhaps Section 7(a) of the Act is applicable to the District's taxes. Over the last few years we have repeatedly requested that an agreement be

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1/ The Nation's representative signed the agreement on Dec. 14, 1989. The agreement is dated Mar. 4, 1991, which is presumably the date it was signed by the District's representative.

The title of the agreement indicates that it is between the District and the "United States of America in trust for the Tohono O'odham Nation of Arizona" as Landowner. However, no representative of the United States signed the agreement. Instead, the Nation's representative signed as Landowner."

2/ The record contains a Mar. 21, 1991, letter indicating that the Nation's payment in the amount of $218,541 was hand-delivered to the District on that date. However, later correspondence indicates that, in early April, the payment had not yet been made. It appears likely that the Nation's letter was incorrectly dated.

> formalized between the District and the United States on this matter. * * * However, based on notes in my file, it is clear that the Nation's prior attorney * * * took the view that irrigation district taxes were not subject to Section 7(a) of the Act but that the Nation was in fact obligated to pay such taxes as a result of certain covenants running with the Farm's land at the time the Schramm Ranch was purchased in 1988. * * *
>
> The obligation to pay District taxes is also clearly set forth in the Agreement for Project Water Service. * * * Section 2 of the Agreement makes it absolutely clear that all District landowners must be current on District taxes as a result of being included with the District's boundaries.
>
> In your letter you suggest that the District has no legal authority to withhold irrigation water service to the Farm given the fact that the District's tax bill was improperly sent to the Nation or its Farming Authority rather than to the United States. As you know, previous tax bills sent to the same location have been paid and it was the Nation and the Farming Authority who entered into the Agreement with the District. Irrespective of whom the Nation and the United States determine is ultimately responsible for paying the District's taxes, the Farm will be treated like all other District land. First half taxes for 1990 must be paid not later than April 8, 1991 to ensure continued water service for the 1991 crop year. Second half taxes are due by May 1, 1991. If the taxes are not received on or before the deadline water service will be terminated by the District to the Farm.

(District's March 29, 1991, letter at 1-2).

On April 3, 1991, BIA requested an opinion from the Field Solicitor on the issues raised in the tribal attorney's March 21 letter. The Field Solicitor responded in an opinion dated April 15, 1991, concluding that the Farm lands were not held in trust status and that the Secretary was not liable for the in-lieu taxes assessed by the District. The Area Director's April 15, 1991, decision adopted the Field Solicitor's opinion. On May 24, 1991, the Field Solicitor issued a preliminary title opinion concerning the Farm lands. In a decision dated July 19, 1991, the Area Director conveyed the title opinion to the Nation and informed the Nation that deeds for the lands could not be approved until a lien against the property had been extinguished. The Area Director stated:

> According to the information contained in the preliminary title opinion, the total capital debt attributable to the acreage in San Lucy Farm is $7,701,191.78. This debt consists of $918,127.28 for repayment of bonds, $2,209,359.30 for repayment of the federal reclamation loan, and $4,573,705.20 for repayment of the cost of groundwater wells. However, the Nation is entitled to a credit for the Schramm wells acquired by the District in the amount of $4,459,806.00. The outstanding lien based on water

availability charges would therefore total $3,241,385.78. In the preliminary title opinion, the Field Solicitor states that the Department of Justice's title standards require that, prior to acquisition, all liens against title (including assessments in special improvement districts) must be fully paid and satisfied, or that adequate provision should be made for their payment or satisfaction. See the Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public Law 91-393, issued October 2, 1970. Based on the preliminary title opinion, the Nation is hereby advised that we will not approve either deed until the above referenced lien is extinguished. Further action on the acceptance of the property in trust will be withheld until we receive documentation which evidences that the lien has been released.

In the preliminary title opinion, the Field Solicitor has suggested the following possible alternatives which might be used to eliminate the above-referenced lien and allow the subject property to be accepted in trust:

> "As alternatives to complete repayment of the outstanding obligation by the Nation, you may wish to discuss with the Nation the posting of a payment bond for the annual charges, the establishment of an escrow account for the full amount of the outstanding charges, a waiver of tribal sovereign immunity to suit on the debt, or some combination of these which would enable the District to release the lien. You may also wish to discuss the possibility of clarifying legislation which would authorize the United States to accept the land in trust subject to existing liens. Cf. 25 U.S.C. 566(d); 25 U.S.C. 713f(c)(4); 25 U.S.C. 483a."

(Area Director's July 19, 1991, Decision at 3).

The Nation's appeals from the two decisions were received by the Board on May 15, 1991, and August 26, 1991. 3/ The appeals were consolidated on September 17, 1991. Both the Nation and the Area Director filed briefs.

Discussion and Conclusions

The issues before the Board are the same as those addressed in the Field Solicitor's April 15, 1991, opinion: (1) Are the Farm lands in trust status by operation of law; (2) if not, is the Nation required to eliminate

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3/ The Nation also filed suit against the Department and the District in Federal district court. Tohono O'odham Nation v. Lujan, CIV-91-0540-PHX-EHC (D. Ariz.). In its opening brief, the Nation stated that it had filed a motion for voluntary dismissal of its suit pending a final Departmental decision from this Board.

the District's liens before the Farm lands are taken into trust status; and (3) is the Secretary obligated under section 7(a) of the Act to pay the District's in-lieu taxes?

The Board first considers the Nation's contention that the lands are in trust status by operation of law.

Subsection 6(d) of the Act provides:

> The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. * * * Land does not meet the requirements of this section if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.

Under this provision, a determination must be made that the Farm lands meet the requirements of the subsection. The clear implication is that it is the Secretary who must make that determination. The fact that this responsibility resides in the Secretary is made especially clear in the last sentence, which vests the Secretary with authority to waive some of the statutory requirements.

Subsection 6 (d) clearly contemplates a request by the Nation and action by the Secretary before trust status is attained. The Board finds that the lands are not presently in trust status.

The Nation next contends that BIA is precluded from imposing any requirements for trust acquisition beyond those contained in subsection 6(d). The crux of the issue here is whether BIA may require the Nation to eliminate the District's liens before the Farm lands are taken into trust. This issue and the third issue listed above, i.e., whether the Secretary is required to pay the District's in-lieu taxes, are closely related. In a sense, the two issues are two sides of the same coin. If Congress intended that the Secretary pay the District's taxes, then, arguably, it did not intend to require the Nation to eliminate the District's liens prior to trust acquisition, given that the liens exist for the purpose of ensuring payment of the taxes. Thus, the pivotal issue appears to be whether Congress intended the Secretary to pay charges in the nature of the District's in-lieu taxes. The Board therefore proceeds to that issue.

The Nation argues that the Secretary is required to pay the District's in-lieu taxes under subsection 7(a) of the Act, which provides: "With respect to any private land acquired by the Tribe under section 6 and held

in trust by the Secretary, the Secretary shall make payments to the State of Arizona and its political subdivisions in lieu of real property taxes."

The Nation contends that the District's taxes are real property taxes under Arizona law, noting that they are so called in the Arizona statutes. The Area Director contends that the District's charges are in actuality special assessments, although classified as "secondary real property taxes" under Arizona law.

[1] In addressing this issue in his April 15, 1991, opinion, the Field Solicitor relied in part on Illinois Central Railroad Co. v. City of Decatur, 147 U.S. 190, 197 (1893), in which the Supreme Court stated:

> Between taxes, or general taxes as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the State as a State, the consideration of which is protection by the State, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods.

See also Barry v. School District No. 210, 105 Ariz. 139, 460 P.2d 634 (1969). 4/

The Field Solicitor found that the District's in-lieu tax

> has the characteristics of a special assessment. It is imposed upon property within a limited area (only upon areas within Pinal County suitable for irrigated agriculture). * * * It is imposed for a local improvement, the District water distribution project, which is supposed to enhance the value of the property in the District. Any landowner may pay a proportional share of the

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4/ In Barry, the Arizona Supreme Court stated:

"The terms 'tax' and 'special assessment' are often used interchangeably and therefore confused, but there is a distinction between them. Previously this Court has defined the word 'tax' as 'a forced contribution of wealth to meet the public needs of the government.' * * * 'Special assessment' has been defined as 'an assessment against real property based on the proposition that, due to a public improvement of some nature, such real property has received a benefit.' * * * The distinction between the two is that a 'tax' is levied against all similarly situated property for purposes which will benefit the public generally. A 'special assessment' is levied only against specific property which is the property benefited by the improvement." (Citations omitted).

460 P.2d at 635-36.

> bonded indebtedness of the District and be released from further levy. [Citations omitted.]

(Field Solicitor's Apr. 15, 1991, opinion at 9).

Finally, the Field Solicitor cited United States v. 129.4 Acres of Land, 446 F. Supp. 1 (D. Ariz. 1976), aff'd 572 F.2d 1385 (9th Cir. 1978), for the proposition that the charges imposed by Arizona irrigation districts are construed as special assessments. That case concerned a condemnation by the United States of land within an Arizona irrigation district. The irrigation district imposed charges against all land within the district for repayment of the costs of construction and the upkeep of the water delivery system. The court found that the charges were distinguishable from taxes and that the district was therefore entitled to compensation for the loss of its assessment base.

The Board finds the Field Solicitor's analysis persuasive on this point. It is apparent that the classification given to the District's charges in the Arizona statutes is not, in the end, determinative of their character. Particularly compelling is 129.4 Acres of Land, a determination in Federal court that charges like the District's charges are special assessments.

[2] It clearly appears that the District's charges do not fall within the general understanding of the term "real property taxes." However, the real question here, as the parties recognize, is one of Congressional intent--that is, did Congress have this kind of assessment in mind when it enacted subsection 7(a)? Normally, Congress may be deemed to have intended a statutory term to have its ordinary meaning unless some other meaning is manifest in the statute or its legislative history. See, e.g., 2A N. Singer Sutherland on Statutory Construction § 46.01 (5th ed. 1992).

There is no explicit discussion in the legislative history of what Congress meant to encompass in the term "real property taxes." However, various provisions of the Act and statements in the legislative history indicate that Congress did not intend to finance the construction of an irrigation system. 5/ For instance, section 2 recites, as findings of Congress:

> (2) An examination of public lands within a one-hundred-mile radius of the reservation disclosed that those which might be suitable for agriculture would require substantial Federal outlays for construction of irrigation systems, roads, education and health facilities.

5/ The Nation argues that, in this case, no construction is involved because construction of the irrigation system has already been completed. There is no question, however, that the District's assessments are imposed, in large part, for the purpose of repaying the costs of construction of an irrigation system.

* * * * * *

(4) This Act will facilitate replacement of reservation land with lands suitable for sustained economic use which is not principally farming and do not require Federal outlays for construction.

Section 8 provides: "If the tribe acquires rights to the use of any water by purchase, rental, or exchange within the State of Arizona, the Secretary, at the request of the Tribe, shall deliver such water, at no cost to the United States, through the main project works of the Central Arizona Project * * * Nothing in this section shall be deemed to obligate the Secretary to construct any water delivery system."

The legislative history of the Act in entirely consistent with the statutory language. It indicates that Congress sought to avoid committing the Federal Government to pay unspecified construction costs for an irrigation system. As explained in the House report on the Act, an earlier bill, introduced in 1984, had provided for the exchange of land within the Gila Bend Reservation for "Federal lands and private lands to be purchased by the Secretary. * * * [T]his legislation authorized an $8,000,000 grant and $5,000,000 for construction of an irrigation system to serve 2,000 acres of land. [However, it became] apparent that the costs for land and/or the water acquisition, construction of a water delivery system, and operation, maintenance and repair (OM&R) costs for the delivery system would far exceed $30,000,000." H.R. Rep. No. 851, supra, at 6-7.

Following rejection of the 1984 proposal, the Nation submitted an alternate proposal which formed the basis for the present Act. The Nation's Chairman stated:

> The tribe's current legislative proposal seeks to reduce the Federal costs of settlement by eliminating the water acquisition, construction, and OM&R provisions of the 1984 legislation and the contingent liabilities of its damages provisions.
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> * * * * * *
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> Knowing the Administration's aversion to legislation in which Federal costs are not specified, the tribe, in its current proposal, has stipulated the major part of the costs of settlement.

(Statement of Josiah Moore, Chairman, Tohono O'odham Nation, Regarding H.R. 4215 (S. 2106), H.R. 4216 (S. 2105) and H.R. 4217 (S. 2107), May 3, 1986). 6/ This understanding was reflected in a statement made by

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6/ A consistent representation was made by the Nation's lobbyist in an Oct. 8, 1985, memorandum to a House staff member:

"With respect to water rights, three aspects of the bil1 are especially

Representative Morris Udall, co-sponsor of the bill, on the floor of the House. He stated: "Enactment would also leave the United States with no contingent liability to the tribe requiring construction of expensive irrigation systems or community infrastructure." 132 Cong. Rec. 25416-17 (1986).

The legislative history also indicates that Congress believed the costs associated with payment of real property taxes would be relatively modest. The Nation's Chairman described them as "nominal" in his May 3, 1986, statement. 7/ The Congressional Budget Office estimated that annual payments for real property taxes would be between $10,000 and $50,000. H.R. Rep. No. 851 at 13. It has turned out that these figures underestimated even the amount of ordinary real property taxes. The real property taxes on the Farm lands for 1990 have been estimated at approximately $58,607, 8/ and the potential total for ordinary real property taxes subject to subsection 7(a) is much higher because the Nation still has authority to purchase up to 6,760 more acres of land. The Nation argues that the Congressional Budget Office estimates are "woefully inadequate" and that "no conclusion as to Congressional intent can be drawn from such inaccurate figures" (Nation's Reply Brief at 20-21). Regardless of their inaccuracy, however, those figures were the ones before Congress when it enacted the Act. Especially in light of Congressional awareness that construction costs for irrigation systems could be very high, these figures suggest that Congress did not intend to include construction repayment costs in the "real property taxes" to be paid by the Secretary.

The Nation argues that canons of statutory construction require that the Act be construed to require the Secretary to pay the District's in-lieu taxes. In particular, the Nation invokes the well-established canon requiring construction of ambiguous statutory provisions in favor of Indians. E.g., County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683, 693-94 (1992). One problem with the Nation's argument is that the provision alleged to be ambiguous, i.e., subsection 7(a) of the Act, was not enacted for the Nation's benefit but, rather, for the

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fn. 6 (continued)
noteworthy. First, the entire responsibility for the acquisition of water rights is the Tribe's. Second, the Tribe's Winters Rights claims to approximately 30,000 acre-feet of water and injuries to those rights would be assigned to the United States. Third, the Secretary of the Interior would have no obligation to construct irrigation delivery or distribution systems or pay any OM&R costs associated with such systems."

7/ The Chairman stated: "The claim values of the proposed Gila Bend settlement are payment to the tribe of $30,000,000 * * *; nominal in-lieu payments for state and local taxes; and $537,000 for water treatment and domestic water and sanitation facilities" (May 3, 1986, Statement at 7).

8/ Pinal County did not actually assess the taxes because the land was owned by the Nation in 1990. The estimate was supplied by the Pinal county Assessor's Office (Area Director's Brief at 20).

benefit of the State of Arizona and its political subdivisions. 9/ Thus, there is a question as to how much force the canon has in the interpretation of this provision, even though the statute in its entirety was clearly enacted for the benefit of the Nation.

More importantly, however, the Act was a negotiated settlement, and the Nation participated in drafting its language. Insofar as the Act resulted from a negotiated settlement, it is akin to a treaty. The canon which the Nation now seeks to invoke had some of its earliest expressions in connection with interpretation of treaties, which the Supreme Court found should be interpreted as the Indians would have understood them. 10/ As discussed above, from all indications in the legislative history, at the time of enactment of the Act, the Nation understood that the Federal Government would not be responsible for paying irrigation charges such as those represented by the District's in-lieu taxes. Accordingly, the Board concludes that the canon of statutory construction cited by the Nation does not compel a conclusion that the Secretary must pay the District's in-lieu taxes under subsection 7(a) of the Act.

The Nation also contends that the Act may not be construed to authorize an intrusion upon tribal sovereignty or to authorize taxation of the Nation. However, the issue here is not whether the District may impose a tax upon the Nation or otherwise intrude upon its sovereignty. Rather, it is whether subsection 7(a) of the Act requires the Secretary to pay the District's in-lieu taxes. From the statutory provisions and legislative history discussed, the Board concludes that Congress did not intend to require the Secretary to do so.

9/ This intent is reflected in subsection 7(a) but is made even more clear in subsection 7(b), which provides:

"The Secretary is authorized to enter into agreements with the State of Arizona and its political subdivisions pursuant to which the Secretary may satisfy the obligation under subsection (a), in whole or in part, through the transfer of public land under his jurisdiction or interests therein, including land within the Gila Bend Indian Reservation or interest therein."

10/ See, e.g., Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943):

"Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. * * * Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' * * * But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." (Citations omitted).

With this conclusion in mind, the Board returns to the question of whether the Nation may be required to eliminate or make provision for satisfying the District's liens prior to trust acquisition of the Farm lands.

The Area Director argues:

> [U]pon acquisition of title by the United States, existing liens survive but cannot be enforced against the United States because of sovereign immunity. United States v. Alabama, 313 U.S. 274 (1941). [However,] the loss of enforcement remedies for an existing lien because of the acquisition of title by the United States is a destruction of a property right which constitutes a compensable taking under the Fifth Amendment. Armstrong v. United States, 364 U.S. 40, 48 (1960); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935).

(Area Director's Brief at 4-5).

As discussed above, the Act and its legislative history indicate that Congress did not intend to create contingent liabilities. 11/ Accordingly, it seems beyond dispute that Congress did not intend to authorize a taking of the District's property.

If Congress did not intend to require the Secretary to pay the District's ln-lieu taxes and did not intend to authorize a taking of the District's lien, then, presumably, it must have intended that the Nation eliminate the liens or make provision for satisfying them prior to trust acquisition.

Such an intent would accord with the standard practice in acquisitions of title to land by the United States. The Department of Justice regulations governing such acquisitions provide: "Prior to or at the time of the acquisition of the title to the property, except as to certain easements as hereinafter set out, all liens against the title must be fully paid and satisfied or adequate provision should be made therefor. This is also true of assessments in improvement districts which are liens and payable in future installments." Section 6(a), Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public Law 91-393. 12/

11/ See also section 6(a) of the Act:

"The Secretary shall not be responsible for the review, approval or audit of the use and expenditure of the moneys referred to in this section [i.e., the $30,000,000 payment to the Nation], nor shall the Secretary be subject to liability for any claim or cause of action arising from the Tribe's use and expenditure of such moneys."

12/ The Attorney General is charged with the responsibility to approve title in land acquisitions by the United States. 40 U.S.C. § 255 (1988) provides: "Unless the Attorney General gives prior written approval of the sufficiency of the title to the land for the purpose for which the land is being acquired by the United States, public money may not be

The Department of Justice title standards are explicitly incorporated into 25 CFR 151.12, concerning trust acquisitions for Indians. 13/

[3] Congress should be deemed to have been familiar with this well-established administrative practice. See, e.g., 2B N. Singer Sutherland on Statutory Construction § 49.09 (5th ed. 1992). Had Congress intended to authorize a departure from the standard practice, it could have done so. It has, on other occasions, specifically authorized trust acquisitions subject to liens. For instance, in 1983 and 1986, it included provisions of this nature in statutes restoring Federal recognition to the Confederated Tribes of the Grande Ronde Community of Oregon, 25 U.S.C. § 713f(c)(4), and the Klamath Tribe, 25 U.S.C. § 566d. 14/ It is clear from these examples, the

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fn. 12 (continued)
expended for the purchase of the land or any interest therein." The Department of Justice has issued regulations and standards applicable to acquisitions. Regulations of the Attorney General Promulgated in Accordance with the Provisions of Public law 91-393, 1970; Standards for the Preparation of Title Evidence in Land Acquisitions by the United States, 1970.

All further references to the United States Code are to the 1988 edition.

13/ 25 CFR 151.12 provides:

"If the Secretary determines that he will approve a request for the acquisition of land from unrestricted fee status to trust status, he shall acquire, or require the applicant to furnish, title evidence meeting the Standards for the Preparation of Title Evidence in Land Acquisitions by the United States issued by the U.S. Department of Justice. After having the title evidence examined, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities which may exist. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable."

The parties disagree as to the applicability of 25 CFR 151.12 and the Department of Justice regulations and standards to this matter. The Board finds that, in light of the evidence of Congressional intent in the Act, it need not decide the technical applicability of these regulatory provisions to the trust acquisition at issue here.

14/ 25 U.S.C. § 713f(c)(4) provides:

"[A]ny real property taken in trust by the Secretary pursuant to such plan [for establishment of a reservation] shall be subject to--

"(A) all legal rights and interests in such land existing at the time of the acquisition of such land by the Secretary, including any lien, mortgage, or previously levied and outstanding State or local tax, and

"(B) foreclosure or sale in accordance with the laws of the State of Oregon pursuant to the terms of any valid obligation in existence at the time of the acquisition of such land by the Secretary."

25 U.S.C. § 566d provides:

"The Secretary shall accept real property for the benefit of the tribe if conveyed or otherwise transferred to the Secretary. Such property shall

second of which was enacted only two months before the Act, that Congress knew how to express its intent that land be taken in trust subject to existing liens. Yet it did not do so in the Act.

The evidence of Congressional intent in the Act, as discussed above, is sufficiently clear to persuade the Board that Congress did not intend to authorize the Secretary to take the Farm lands into trust status without first requiring the Nation to eliminate or make provision for satisfying the District's liens.

The Nation's final argument is that the portion of the District's in-lieu tax which is levied to repay the Federal Government's capital outlay for irrigation system construction costs must be eliminated or deferred under the Leavitt Act, 25 U.S.C. § 386a, and the Colorado River Basin Project Act, 43 U.S.C. § 1542. The Area Director did not consider this question in the decisions on appeal here. Since the question concerns the manner in which outstanding liens may or should be eliminated, rather than whether they must be eliminated in the first instance, the Nation's argument is not foreclosed by the decision here. Rather, the Nation may raise the argument before the Area Director in regard to the determination of whether it has satisfied or made provision for satisfying outstanding liens.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 15, 1991, and July 19, 1991, decisions of the Acting Phoenix Area Director are affirmed.

_____
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Chief Administrative Judge

_____
fn. 14 (continued)
be subject to all valid existing rights, including liens, outstanding taxes (local and State), and mortgages. Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the tribe."